No. 11,383

In the United States Circuit Court of Appeals for the Ninth Circuit

CHARLES STROM AND FLORA STROM, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Summary of argument	5
Argument:	
Neither the Quinault Indian nor the income derived by him from fishing operations on the Quinault River is exempt from the federal income tax	5
1. The issue	5
2. The development of the governing principles	8
3. The rationale of the Supreme Court's decision in the case of *Superintendent* v. *Commissioner*	19
4. There is no exemption from the tax in the Quinault Treaty	23
Conclusion	28

CITATIONS

Cases:	
Bagby v. *United States*, 60 F. 2d 80	13
Carpenter v. *Shaw*, 280 U. S. 363	12
Childers v. *Beaver*, 270 U. S. 555	22
Choate v. *Trapp*, 224 U. S. 665	12
Choctaw Nation v. *United States*, 318 U. S. 423	24
Choteau v. *Burnet*, 283 U. S. 691	9
Chouteau v. *Commissioner*, 38 F. 2d 976	9
Dick v. *Commissioner*, 76 F. 2d 265	16, 17
Elk v. *Wilkins*, 112 U. S. 94	12
Gillespie v. *Oklahoma*, 257 U. S. 501	11, 22
Graves v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466	27
Halbert v. *United States*, 283 U. S. 753	6
Heiner v. *Colonial Trust Co.*, 275 U. S. 232	11
Helvering v. *Mountain Producers Corp.*, 303 U. S. 376	22
Landman v. *Commissioner*, 123 F. 2d 787, certiorari denied, 315 U. S. 810	21
Landman v. *United States*, 58 F. Supp. 836	21
McCulloch v. *Maryland*, 4 Wheat. 316	26
Mason v. *Sams*, 5 F. 2d 225	25
Oklahoma Tax Comm'n v. *United States*, 319 U. S. 598, affirming 131 F. 2d 635	12, 21
Old Colony Trust Co. v. *Commissioner*, 279 U. S. 716	27
Pittman v. *Commissioner*, 64 F. 2d 74	13
Seufert Bros. Co. v. *United States*, 249 U. S. 194	24
Shaw v. *Oil Corp'n*, 276 U. S. 575	11, 16

721876—46——1

Revenue Code. (R. 3–14.) The decision of the Tax Court sustaining the deficiency (except as to the penalty which was waived) was entered March 29, 1946. (R. 39–40.) The proceeding is brought to this Court by the petition for review aforesaid, which was filed June 17, 1946 (R. 41–47), pursuant to a stipulation re venue (R. 40), under the provisions of Sections 1141 and 1142 of the Code.

QUESTION PRESENTED

Whether the taxpayers, husband and wife, who are full-blood, restricted Indians, are exempt from the payment of income taxes under the provisions of the Quinault Treaty of July 1, 1855.

STATEMENT

So far as essential here, the facts found by the Tax Court (R. 26–30) may be summarized as follows:

The taxpayers, husband and wife (although made citizens of the United States by the Act of June 2, 1924, c. 233, 43 Stat. 253), are full-blood, noncompetent, restricted Quinault Indians. They reside at the Indian village of Taholah, Washington, which is on the Quinault Reservation. (R. 26.)

In the taxable year 1941 they derived gross income from fishing operations on the Quinault River of $5,917.29, and net income of $3,316.70. (R. 29.)

Article II of the Quinault Treaty dated July 1, 1855, provides as follows (R. 26–27):

> Article II. There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land

> sufficient for their wants within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use, and no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian affairs or Indian agent. And the said tribe bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the meantime it shall be lawful for them to reside upon lands not in the actual claim and occupation of citizens of the United States, and upon any lands claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through said reservation, on compensation being made for any damage sustained thereby.

In carrying out the provisions of the treaty, the President of the United States on November 4, 1873, set apart a permanent reservation. Its western boundary is the Pacific Ocean. At its eastern extremity and within the reservation is Quinault Lake. From this lake the Quinault River flows through the reservation, emptying into the Pacific Ocean in the Indian village of Taholah. Twice each year there is a run of salmon from the sea up the river to spawn in the lake. (R. 27.)

The Indians fish with gill nets set in the river. The fishing is done at certain fixed and chartered locations on the river. These are allotted periodically to certain members of the tribe by the Tribal Council, and

operations at their allotted station on the Quinault River.[1]

By the treaty, the ancient fishing rights of the Quinault Tribe were reserved by the tribe, as well as confirmed in it by the Government. The treaty did not, however, expressly grant members of the tribe exemption from any tax, nor has exemption therefrom been granted them since by any federal statute.[2]

We believe that a negative answer to the question stated will suffice to answer in the negative three subsidiary questions posed by the taxpayers, namely, first (Br. 44–62), whether, apart from any treaty exemption, the Internal Revenue Code fails to authorize the imposition of the tax; second (Br. 63–64), whether the gain from the taxpayers' fishing operations was a capital gain, and third (Br. 64–69), whether the Government is estopped to impose the tax on income derived by them in any taxable year prior to a taxable year beginning in 1943.

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[1] By the Act of June 2, 1924, c. 233, 43 Stat. 253, the Quinault Indians were made citizens of the United States, but no significance is attached to that fact here.

[2] Article III provides (12 Stat. 971, 972):

"The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands. *Provided, however*, That they shall not take shell-fish from any beds staked or cultivated by citizens; and provided, also, that they shall alter all stallions not intended for breeding, and shall keep up and confine the stallions themselves."

See also *Halbert* v. *United States*, 283 U. S. 753, 756.

The taxpayers' contention that an affirmative answer should be given to the *first* subsidiary question, whether, assuming that there is no treaty exemption, the Internal Revenue Code itself fails to authorize the tax, rests upon the premise—which we believe to be false—that no decision expressly justifies the tax in the circumstances here; while, on the other hand, the course of administrative procedure prior to 1941, based upon certain opinions of the Attorney General, as well as upon certain court decisions and administrative rulings, justifies the view that the income in question is exempt.

The taxpayers' contention that an affirmative answer should be given to the *second* subsidiary question, whether the income in question was a capital gain for the determination of which no facts were established, rests upon the assumption that the gain was not derived from the taxpayers' fishing operations, as such, but from the sale of the fish which they caught, and which, for purposes of the argument, they presumably regard as belonging to the tribe rather than to them. The taxpayers' theory is that the tribe, as distinguished from its members, had two capital assets, both of which it and not the individual members thereof owned. One of these was the timber on the Quinault reservation, and the other the fish in the Quinault River. The fact that, in order to reduce the fish to possession, they must be caught by an individual member of the tribe, at a station assigned to him by the Tribal Council, and at his own expense, and that, when so reduced to possession, they become

721876—46——2

were not regarded by the court as justifying the grant of an exemption from the tax to one Choteau, a competent member of the Osage Tribe, whose quantum of Indian blood was, however, not disclosed by the record, and whose income consisted of his pro rata share of the income from tribal mineral leases given with the approval of the Secretary of the Interior. As a competent Indian, Choteau had the exclusive management of his own affairs, and, as a result, had, in the court's view, assumed the same burdens that the law imposed upon every other individual owner of property. Accordingly, the court held—and this is the basis of its decision—that Choteau's civil status as thus fixed brought him within the terms of the income tax statute. The fact that the income in question was derived by him from tribal lands appears not to have been regarded by the court as in any wise determinative of the matter.

The *Choteau* case was reviewed by the Supreme Court, certiorari having been granted on Choteau's petition—and the taxability of the income in question was there affirmed. *Choteau* v. *Burnet, supra.* The Supreme Court stated that two contentions were made by Choteau: First, that the federal taxing statute evidenced no intent to tax him on such income; and, second, that, if its language was broad enough to do so, both his status and the nature of the income required a holding that he was exempt.

The Court rejected the first by saying that the intent of Congress was to levy the tax with respect to all residents of the United States and upon all sorts of income; that the taxing act did not expressly ex-

empt the sort of income there involved, or a person having Choteau's status respecting such income, and that it had been referred to no statute which did.

With regard to Choteau's contention that his status as an Indian required his exemption from the tax, the Court further said, that, aside from the fact that no treaty had any bearing on the subject, the course of legislation disclosed a plan of the Government to gradually emancipate the Indian from his former status as a ward, and that, in view of Choteau's emancipation by being declared competent, his claim that with respect to his income he was restricted, and therefore that the income was exempt, must fail.

And, in disposing of the contention that the nature of the income made it necessary to exempt it from the tax, the Court said that, while royalties received by the Government from mineral leases of Indian lands had been held to be beyond a state's taxing power (citing *Gillespie* v. *Oklahoma,* 257 U. S. 501 (since overruled by the Court, see footnote 9, *infra*), and *Shaw* v. *Oil Corp'n.,* 276 U. S. 575), on the ground that, so long as they are in possession of the United States, they are a federal instrumentality to be used to carry out a governmental purpose, it did not follow that they could not be subjected to the federal tax; and, in this connection, that the intent to exclude must definitely be expressed, where, as there, the general language of the act laying the tax was broad enough to include the subject matter (citing *Heiner* v. *Colonial Trust Co.,* 275 U. S. 232, as well as *Shaw* v. *Oil Corp'n., supra*).

Thus, though the Court did not expressly refer thereto, it apparently regarded as irrelevant in the construction of the federal taxing act the rule that general laws of the United States are inapplicable to Indians, unless so expressed as clearly to manifest an intention to include them.[4]

Be that as it may, after the Supreme Court had decided the *Choteau* case, the Tenth Circuit had occasion to consider three further cases, in each of which

[4] Incidentally, it is to be observed that the principle was referred to and relied on by the Tenth Circuit in its decision in the case involving Mary Blackbird, already referred to and decided by it with the case involving Choteau. In support, the court (38 F. 2d, p. 977) cited *Elk* v. *Wilkins*, 112 U. S. 94, 100, together also with *Choate* v. *Trapp*, 224 U. S. 665, for the corollary principle, that, while exemptions from taxation are to be strictly construed, the rule is different as regards statutes exempting Indians from taxation. See also *Carpenter* v. *Shaw*, 280 U. S. 363. On the other hand, this rule has apparently been considered by the Supreme Court as being inapplicable to a state tax upon leaseholders of lands belonging to a restricted Indian, measured by the percentage of the gross value of oil and gas produced. The land in question belonged to a non-Indian citizen of Oklahoma and was then subject to state taxation. But it had been purchased by the Secretary of the Interior for a minor full-blood Creek Indian, with money derived as royalties from a departmental lease of his restricted allotment. Subsequently the land was let for oil and gas exploitation under a departmental lease and the tax was levied on the leaseholders. *Shaw* v. *Oil Corp'n*, already cited in the text, *supra* (276 U. S. 575). Furthermore, in *Superintendent* v. *Commissioner*, 295 U. S. 418, 421, hereinafter more fully discussed in the text, the Court said that general exemption from the tax (such as was involved in *Carpenter* v. *Shaw*, *supra*), related, in any event, only to land and not to income derived by a full-blood, restricted Indian from investment of his surplus income from the land. The rule, however, seems to be different as regards a state inheritance tax levied in respect of the passage of restricted Indian lands at and as a result of the Indian owner's death. *Oklahoma Tax Comm'n* v. *United States*, 319 U. S. 598, 611.

it undertook to apply what it considered to be the rule in that case to a different state of facts. These cases are *Bagby* v. *United States,* 60 F. 2d 80; *Pittman* v. *Commissioner,* 64 F. 2d 74; *Superintendent Five C. Tribes, Etc.* v. *Commissioner,* 75 F. 2d 183, being the second Tenth Circuit case to be reviewed by the Supreme Court.

In the meantime, the then General Counsel of the Bureau of Internal Revenue had undertaken to construe the Supreme Court's decision in the *Choteau* case and had concluded that the Court had therein drawn the dividing line between the original restricted *allottee* lands of the Five Civilized Tribes and new acquisitions of property for a restricted allottee member thereof. Accordingly, the General Counsel concluded that income, even if of a restricted Indian, from his reinvestments by the Interior Department of income from tax-exempt, restricted, allotted lands was taxable to the same extent as the investment income of other residents of the United States; but that such case was to be distinguished from the *Blackbird* case, as he regarded that case to be modified in effect by the decision of the Supreme Court in the *Choteau* case, on the ground that substantially all of the income involved in the *Blackbird* case was derived from the original tribal property or from restricted allotted lands. In this connection, the General Counsel said that the status of reinvestment income had not been considered in that case. See G. C. M. 9621, X–2 Cum. Bull. 111 (1931). It is to be noted that this ruling was referred to and relied on by the Tenth Circuit in the *Superintendent Five C. Tribes, Etc.* case, *supra,* p. 184

and that it is also cited by the taxpayers in their brief (p. 56).[5]

The application of the Supreme Court's decision to the facts in the *Bagby* and *Pittman* cases appears to have given the Tenth Circuit no great difficulty. The *Bagby* case involved income from an oil and gas lease in the form of royalties upon the surplus allotments of a minor, one-sixteenth blood, Creek Indian. By the applicable Act of Congress, the allotments in question were unrestricted and subject to taxation, because owned by an Indian of mixed blood having less than one-half Indian blood. The decision of the court proceeded upon the narrow ground that the removal of the restriction upon the alienation of the property from which the income was derived justified the imposition of the federal income tax, and that, in these circumstances, it clearly appeared from that Act, as also from the Revenue Act of 1918, that Congress intended to subject the income to the tax.

Similarly, in the *Pittman* case, the Tenth Circuit

[5] What the taxpayers fail to point out, however, is that, after the decision of the Supreme Court in *Superintendent* v. *Commissioner*, *supra*, this ruling was corrected by the General Counsel to conform therewith. See G. C. M. 16020, XV–1 Cum. Bull. 78 (1936), and G. C. M. 16100, *id.*, p. 80, which broadened administrative practice to subject to the income tax not only so-called investment income of restricted Osage Indians, but rents, royalties and bonuses derived by them from mineral leases of the tribe, although the ruling still held exempt from the tax income derived from the homestead allotments of restricted Osage Indians, because made inalienable and nontaxable by the Osage Act of 1906, c. 3572, 34 Stat. 539. Of course, these rulings do not visualize the situation here presented, and nothing in them can be regarded as dispositive of the taxpayers' liability here.

held, on the authority of its own decision in the *Bagby* case (the Supreme Court's decision in the *Choteau* case not being expressly mentioned), that whether allotted lands, and therefore the income therefrom, became subject to taxation on passing by inheritance from a one-half blood Indian (in whose hands all but an allotted homestead was free from restrictions), to a full-blood Indian, must be determined from a construction of the applicable provisions of the governing Act of Congress. The court therefore held that, since all property, except the decedent's homestead, came into the possession of his heir unrestricted, none, except the homestead, was exempt from taxation. Accordingly, the court concluded that all the income derived therefrom, except that derived from the homestead, was subject to the tax.

However, the case of *Superintendent Five C. Tribes, Etc.* v. *Commissioner, supra* (affirmed by the Supreme Court in *Superintendent* v. *Commissioner, supra,* as stated), gave the Tenth Circuit more difficulty, being decided by it by a divided court, Judge Lewis who had written the opinion in the *Choteau* case dissenting. The court stated the question in the case to be whether the income of a minor, restricted Indian, derived from investments made by his guardian with income from his ward's allotment, is subject to the federal income tax. The majority of the court accepted as datum its decision in the *Blackbird* case that income received by a minor, restricted Indian from his allotment, as well as income received by him from tribal property held in trust for him,

was *not* subject to the federal income tax.[6] On the other hand, it also accepted as datum certain Supreme Court and Circuit Court of Appeals decisions, which it cited, and which are set out in the margin,[7] that lands purchased for investment from such savings, although restricted, were subject to *state* taxation.

Proceeding on the premise that, in the *Choteau* case, the Supreme Court "disclaimed" an intent to pass upon the taxability of an incompetent Indian—whereas that Court had only said (283 U. S. 695) that it was not concerned therewith in that case—the Tenth Circuit (75 F. 2d, p. 185) concluded, from a review of its decisions in the *Blackbird* and *Choteau* cases, as well as from a review of the subsequent decision of the Supreme Court in the *Choteau* case and its own decision in the *Pittman* case, which followed the *Choteau* case, that these decisions supported the conclusion that a full-blood Indian was an individual embraced in the term "every individual" as used in the federal taxing statute, and that such exemption from taxation as he enjoyed arose not from his blood or race, but from the nature of the property giving

[6] Still later, but before the decision of the Supreme Court affirming the *Superintendent Five C. Tribes* case, the Tenth Circuit took a similar view in *Dick* v. *Commissioner*, 76 F. 2d 265, in which the question whether Congress intended to tax restricted Indians was only incidentally involved, but the court stated that the matter was only one of intent and not of power, citing the Supreme Court's decision in the *Choteau* case and its own decisions in the *Pittman* and *Superintendent Five C. Tribes* cases.

[7] *Shaw* v. *Oil Corp'n*, 276 U. S. 575; *United States* v. *Ransom*, 284 Fed. 108 (C. C. A. 8th), affirmed 263 U. S. 691; *United States* v. *Gray*, 284 Fed. 103 (C. C. A. 8th), and *United States* v. *Mummert*, 15 F. 2d 926 (C. C. A. 8th).

rise to the income. In this connection, the court observed that, in the cases so far considered, the property from which the taxable income was derived was *unrestricted* and therefore subject to taxation. On the other hand, the court said, that in the case before it, the property giving rise to the income was restricted, as was the income itself. Thus it considered that the question presented was whether the fact that the land was restricted exempted it from taxation. It stated that this question had not been answered so far as federal taxes were concerned, although it had conclusively been answered as to state taxes, reference being to cases cited in footnote 7, *supra*. That being so, the court concluded (p. 186) that, if Congress intended such investments as were involved in the case to be subject to state taxation, it could see no reason for holding that it intended to exempt the income therefrom from federal taxation. In the court's view, it followed that the intent of Congress was to subject the income from investments of surplus funds, as well as the investments themselves, to the federal income tax, although the property giving rise thereto was restricted. See also *Dick* v. *Commissioner,* 76 F. 2d 265 (C. C. A. 10th).

It is thus apparent that, while the Tenth Circuit had broadened its concept of federal taxation of Indians, it was still giving a wide berth to the proposition that the imposition of the income tax depended neither upon the Indian's status, nor upon that of his property or the income derived therefrom, but only upon the answer to the simple question whether he

had derived income not expressly exempt from the tax by treaty, or by some statute other than the income tax act, for the latter did not serve to do so. The dissenting opinion of Judge Lewis but serves to emphasize this fact, for it is pitched upon the proposition that, contrary to the view of the majority of the Court, under its decisions in the *Bagby, Pittman* and *Choteau* cases, and particularly under its decisions in the *Bagby* case, the restriction of the Indian or his property necessarily implied a Congressional intent to exempt from the tax both him and his property, as well as the income derived therefrom. Of course, the Supreme Court had then not expressly pointed out, as it did later on review of the case, in *Superintendent* v. *Commissioner* (295 U. S., p. 420), already referred to and about to be discussed, that it was erroneous to suppose "inalienability and nontaxability go hand in hand."

However, it is in the light of the Tenth Circuit's view of the *Superintendent Five C. Tribes* case that its affirmance by the Supreme Court must be read; for a perusal of the Supreme Court's decision therein can lead to but one conclusion, namely, that in affirming the case, the Court completely rejected the basis upon which the lower court had decided it, and that, as we have indicated, it grounded its affimance upon the broad principle that no Indian, whatever his status, or his income, from whatever source derived and whether restricted or not, is exempt from the income tax unless such exemption is expressly granted to him or to his income by some other Act of Congress, or perchance by treaty.

3. *The Rationale of the Supreme Court's decision in the case of* SUPERINTENDENT *v.* COMMISSIONER.—The Supreme Court briefly stated the facts in *Superintendent* v. *Commissioner, supra* (295 U. S. 418), to be that Sandy Fox, for whom the suit was instituted, was a full-blood Indian; that certain funds derived from his restricted allotment, in excess of his needs, had been invested, and that the proceeds thereof (i. e., the income therefrom) were collected and held in trust for him. The Court stated the question on these facts to be whether this income was subject to the tax. It then pointed out that the Superintendent maintained the court below should have followed the rule which it had applied in the *Blackbird* case, and also that it erroneously held Congress intended to tax income derived from the investment of funds arising from restricted lands belonging to a full-blood Indian.

Quoting that part of the Tenth Circuit's decision in the *Blackbird* case, upon which that court had rested its conclusion that Mary Blackbird, a restricted full-blood Osage, was not subject to the tax, as follows (p. 419):

> Her property is under the supervising control of the United States. She is its ward, and we cannot agree that because the income statute, Act of 1918 (40 Stat. 1057), and Act of 1921 (42 Stat. 227), subjects "the net income of every individual" to the tax, this is alone sufficient to make the Acts applicable to her. Such holding would be contrary to the almost unbroken policy of Congress in dealing with its Indian wards and their affairs. Whenever they and their interests have been the

> subject affected by legislation they have been named and their interests specifically dealt with.

the Supreme Court categorically said (p. 419):

> This does not harmonize with what we said in *Choteau* v. *Burnet,* 283 U. S. 691, 693–696.

The Court then quoted the language it had used in the *Choteau* case, to the effect that Congress intended to levy the tax with respect to all residents of the United States and upon all sorts of income; that the Act did not expressly exempt the sort of income therein involved, or a person having Choteau's status, and that it was referred to no other act which did, and that the intent to exclude must be definitely expressed where, as in that case, the language of the act laying the tax was broad enough to include the subject matter.

The Court also dismissed the Superintendent's contention, to which we have already referred, that "inalienability and the nontaxability go hand in hand," and that it was not likely to be assumed Congress intended to tax the ward for the benefit of the guardian, by again pointing out (p. 420) that the terms of the taxing statute included the income under consideration, and, if exemption existed "it must derive plainly from agreements with the Creeks or some Act of Congress dealing with their affairs."

And, finally, in disposing of the Superintendent's suggestion that exemption must be inferred from the Act of April 26, 1906, c. 1876, 34 Stat. 137, which not only extended the restriction upon alienation of allotments, but provided for their exemption from

taxation, the Court said (p. 421), that such exemption related to land and not "to income derived from investment of surplus income from land." Incidentally the Tenth Circuit appears now to have accepted that view. See *Landman* v. *Commissioner,* 123 F. 2d 787, 790, certiorari denied, 315 U. S. 810.[8]

We do not regard the last-quoted language as intended to restrict the tax to income derived from investment of surplus income. For, so restricted, it would gloss the broad basis of the decision, that, barring an express exemption by treaty or by an Act of Congress dealing with Indians and their property, the income tax applies to them, whatever their status, as well as to their property, regardless of whether it was restricted or not, including their income, from whatever source derived, and precisely in the same

[8] Cf. *Oklahoma Tax Comm'n* v. *United States*, 319 U. S. 598, affirming a holding of the Tenth Circuit (131 F. 2d 635) that the Oklahoma inheritance tax was inapplicable to the passage at death of restricted Indian lands. The Supreme Court's affirmance, however, proceeded upon the ground that an express exemption from taxation of the lands—by the State of Oklahoma—was controlling. Since then, the Court of Claims has held, on the supposed authority of the Supreme Court's decision in the *Oklahoma Tax Comm'n* case, that the passage of such property is immune from the federal estate tax, on the theory that the two taxes are substantially similar, although, concededly, there was no express exemption from the lands from any federal tax. Furthermore, the Court of Claims appears to have disregarded the apparent approval by the Supreme Court (p. 608) of the Tenth Circuit's decision in *Landman* v. *Commissioner*, cited in the text, *supra*. *Landman* v. *United States*, 58 F. Supp. 836. It should be noted that the Solicitor General's decision not to apply for certiorari in this case was not predicated on an acceptance of the validity of the decision, or on the assumption that it was not in conflict with the Tenth Circuit's decision in *Landman* v. *Commissioner*, *supra* (123 F. 2d 787).

manner and to the same extent as the tax applies to other residents of the United States, their property and income, not expressly exempt.[9]

In any case, the taxpayers here can get no comfort from a possible contrary conclusion; for, as has already been stated, their income was not derived from restricted property, or even from property acquired for them by surplus income from restricted property. It was derived from what to all intents and purposes was a commercial fishing operation, carried on by them and involving the payment by them of such ordinary and necessary expenses as are usually incurred in connection with such operations.

We therefore submit not only that the decision of the Supreme Court in *Superintendent* v. *Commissioner,* but the apparently broad scope of its decision in *Choteau* v. *Burnet,* sustains the tax here, unless, indeed, the Quinault Treaty exempts either the taxpayers themselves, or the income they derived from their fishing operations, from the tax. Of course, as stated, there is no Act of Congress which does, and the taxpayers do not claim that there is.

[9] Moreover, as the Court pointed out in *Oklahoma Tax Comm'n*, *supra* (see footnote 8), the doctrine of constitutional immunity from taxation for the income of the Indian's holdings on the federal instrumentality theory has been renounced in *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, which, as the Court said, in effect overruled *Childers* v. *Beaver*, 270 U. S. 555. It is to be noted that *Helvering* v. *Mountain Producers Corp.*, *supra*, p. 387, also overruled *Gillespie* v. *Oklahoma*, 257 U. S. 501, where the immunity of income from the state income tax was attributed to the exemption therefrom of the property from which the income was derived, though, as indicated, in the *Oklahoma Tax Comm'n* case, the Supreme Court has refused to extend this rule to state inheritance taxes. See footnote 8, *supra*.

4. *There is no Exemption From The Tax in the Quinault Treaty.*—A mere reading of Article III of the Quinault Treaty (12 Stat. 971) is sufficient to show that there is no such exemption therein. There could hardly have been, for up to the time the treaty was made there was no federal income tax; and so far as we are aware, no federal tax which could affect these Indians, at least as regards their fishing operations. We again refer to this hereafter. It is, moreover, significant that, when an income tax was imposed, no exemption was granted them, either by the Act itself, or by an act dealing with them and their affairs.

It is not a fair inference that the treaty, nevertheless, was intended to exempt them, or their income, from the tax, or that it served to do so. It is not helpful here to say that the treaty should be construed as the Indians understood it, and that all doubts must be solved in their favor. To be sure that is the way it should be construed. So construed, however, the treaty, at best, merely assured the Indians that no restrictions or conditions would be imposed upon their ancient and reserved rights to fish, except those imposed by the treaty itself, which included the right of others to fish at their accustomed places.

For, as the Court pointed out in *Shoshone Indians* v. *United States,* 324 U. S. 335, 353, the rule of construction referred to means no more than that the language should be construed in accordance with the tenor of the treaty. Moreover, the Court said that

this is the meaning of the other cases which the petitioners in that case cited upon the point, among which are *United States* v. *Winans,* 198 U. S. 371, 380; *United States* v. *Payne,* 264 U. S. 446, 448–449; *Seufert Bros. Co.* v. *United States,* 249 U. S. 194, 198, and *Tulee* v. *Washington,* 315 U. S. 681, upon all of which the taxpayers here rely in support of their contention that a reservation of an exemption from the income tax upon the income derived from their fishing operations should be read into the treaty, in order to avoid what would otherwise be an injustice to them. Answering a similar contention made on behalf of the Indians, the Court, in the *Shoshone Indians* case, went on to say (*loc. cit.*) that, while it attempts to determine what the parties meant by the treaty, it stopped short of varying its terms to meet alleged injustices; that such generosity, if any may be called for in the relations between the United States and the Indians, is for Congress, citing *United States* v. *Choctaw Nation,* 179 U. S. 494, 534–536, and *Choctaw Nation* v. *United States,* 318 U. S. 423, 432.

Of course, no act by non-Indians, such as the exercise by others than Indians of the right to fish, would, in view of the treaty, be permitted, in effect, to destroy the fishing rights which the Indians had reserved in the treaty. See *United States* v. *Winans, supra; Seufert Bros. Co.* v. *United States, supra.* Indeed, it is this principle which underlies the decision of the Supreme Court in *Tulee* v. *Washington, supra,* wherein the Court denied the State of Washington the right to impose, as a condition to the exercise of

such right, the payment of a license fee, even though it was small and fair, and was levied, at least in part, as an incident to the state's power to regulate fishing within its boundaries, which concededly extended to fishing by Yakima Indians, there involved. It is apparent that the *Tulee* case is so far removed from the principles involved in *Choteau* v. *Burnet* and *Superintendent* v. *Commissioner, supra,* that the citation of neither was deemed by the Court to have been required, even in passing, in the *Toulee* case.

A similar conclusion to that reached by the Supreme Court in the *Tulee* case had theretofore been reached by the United States District Court for the Western District of Washington in *Mason* v. *Sams,* 5 F. 2d 225, which involved an attempt by the Commissioner of Indian Affairs and the Secretary of the Interior to regulate the fishing operations of the Quinault Indians, and in that connection to impose upon them a fee, which the regulations denominated a "royalty," to be used for the support of aged and destitute members of the tribe. Such royalty was to be measured by receipts. The imposition of the fee upon the fisherman Indian was attempted to be justified on the theory that the fishing rights belonged to the tribe, and that only a comparatively small number of the members thereof could be assigned to fishing locations. We apprehend that, had the Tribal Council made the regulations, they would not have been objectionable, and the charge of the fee, however measured, would not have been subject to attack on the ground that it did not have the power to impose a

charge of that sort. The point is that the basic objection to the regulations was not that Congress had no power to authorize the Commissioner and Secretary to make them, or that, had it done so, they were unreasonable, but that, absent such authorization, the Commissioner and the Secretary had no such power. Thus the District Court stated the question to be whether, under the applicable treaty and laws, the Commissioner and Secretary had the "discretion" to make the regulations, observing that, if they did, they were necessary parties and the bill should be dismissed, though it need not be dismissed if they had no such discretion. Accordingly, the court denied the motion to dismiss because it concluded that they had no such discretion.

There is, therefore, nothing which justifies an assumption that the principles laid down by the Supreme Court in *Choteau* v. *Burnet* and *Superintendent* v. *Commissioner* were in any wise intended to be qualified by its decision in the *Tulee* case. It follows that, since there is no express exemption from the tax in the Quinault Treaty, or even one necessarily to be implied therefrom, and none in any Act of Congress, the taxpayers are subject to the tax.

This conclusion is in no wise impaired by the taxpayers' reference (Br. 32) to Chief Justice Marshall's dictum in *McCulloch* v. *Maryland,* 4 Wheat. 316, 341, that "the power to tax involves the power to destroy." Aside from the fact that the soundness of this "flourish of rhetoric" has sometimes been brought into question (see, e. g., Mr. Justice Frankfurter's concurring

opinion in *Graves* v. *N. Y. ex rel. O'Keefe,* 306 U. S. 466, 488–490), it does not admit of doubt that Congress has the power to impose the income tax on the Indian in the same manner and to the same extent as it is imposed upon any other resident of the United States. Indeed, the taxpayers admit the power, claiming only that it has been renounced in the Quinault Treaty. They do not, however, claim that it has been expressly renounced therein. But, if Congress had intended to renounce the power, it seems clear that it would have done so expressly. And, since there was no federal internal revenue law in force at the time the treaty was made—none having been imposed for a period of 43 years from 1818 to 1861—there was no occasion to exempt the Indian therefrom, either by treaty or by statute dealing with their affairs.[10]

In any case, immunity can no more be made to rest on treaty implication than it can be made to rest upon statutory implication. *Superintendent* v. *Commissioner, supra; Oklahoma Tax Comm'n* v. *United States, supra.* Moreover, the tax here in question was not designed to destroy the taxpayers' fishing rights. It will be time enough to consider the power of Congress to destroy them by a tax when it undertakes to impose one designed to do so. See *Old Colony Tr. Co.* v. *Commissioner,* 279 U. S. 716, 731.

[10] It is to be noted that at the time the treaty was made all property of Indians was expressly exempt by the Laws of the Territory of Washington from the only tax which could have been applied to them. See Statutes of the Territory of Washington, Being the Code Passed by the Legislative Assembly at Their First Session Begun and Held at Olympia, February 27, 1854, pp. 331–332.

CONCLUSION

For the reasons stated the decision of the Tax Court should be affirmed.

Respectfully submitted.

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